

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DARREN WALDEN)	
Claimant)	
)	
VS.)	
)	
B. A. BARNES ELECTRIC, INC.)	
Respondent)	Docket No. 220,421
)	
AND)	
)	
FEDERATED MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the June 5, 2006, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on September 26, 2006.

APPEARANCES

James R. Shetlar, of Overland Park, Kansas, appeared for the claimant. Matthew J. Hempy, of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found that the Workers Compensation Act does not provide for substitution of parties upon the death of an employee. Accordingly, the claimant's timely filing of a Form K-WC E-1 satisfied the Act's procedural requirement

for hearing and an award. The ALJ further found that respondent's ability to defend on the issues before the ALJ was not affected by claimant's death, and respondent was afforded a reasonable opportunity to be heard and present evidence despite claimant's death. The ALJ further found that although Dr. Jeffrey MacMillan testified that claimant was entitled to an 11 percent permanent impairment rating to the body as a whole based on the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), 3rd Edition, the tables and page numbers he used correspond to the AMA *Guides* 3rd Edition Revised. Accordingly, Dr. MacMillan's rating satisfied the mandate of K.S.A. 44-510e(a) (Furse 1993) that "[f]unctional impairment . . . [be] based on the third edition, revised, of the American Medical Association Guidelines [*sic*] for [*sic*] the Evaluation of Physical [*sic*] Impairment." The ALJ found that Dr. MacMillan's rating was more accurate than the rating of Dr. Edward Prostic of 25 percent permanent partial disability to the body as a whole, noting that Dr. Prostic admitted that his method of measuring range of motion did not conform to the standards recommended by the AMA *Guides*, 3rd Edition Revised. The ALJ awarded claimant an 11 percent permanent partial impairment to the body as a whole and ordered the award to be paid to claimant's estate.

Respondent argues that a deceased claimant cannot maintain a cause of action under the Workers Compensation Act and contends the ALJ erred in allowing the action to proceed in the name of the deceased claimant instead of the real party in interest. Respondent further argues that it was prejudiced because it was not given the opportunity to cross-examine claimant or have a revised rating report after claimant had further medical treatment after claimant was last seen by Dr. MacMillan. Respondent also asserts the ALJ erred in ordering it to pay the award to the claimant's estate when no such estate was opened.

Claimant argues that under the Workers Compensation Act, a claimant is not required to substitute a real party in interest upon that claimant's death. Claimant also claims the ALJ erred by using the AMA *Guides* to determine that the tables and page numbers Dr. MacMillan referred to in the AMA *Guides*, 3rd Edition, correspond to those in the AMA *Guides*, 3rd Edition Revised.

Claimant requests the ALJ's award be modified to show a 25 percent permanent partial impairment to the body based on the rating of Dr. Prostic. Respondent contends this issue was not raised by either party on appeal and, as such, the Board has no jurisdiction over this issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked as an electrician for respondent. On January 7, 1996, he lost his footing on some ice and fell, landing on his low back. On June 7, 1996, claimant had a partial laminectomy of L4, a complete laminectomy and disk excision of L5, and posterior interbody fusion and posterolateral fusion at L5-S1. He was eventually referred to Dr. Jeffrey MacMillan, a board certified orthopedic surgeon, first seeing him on September 13, 1996. At that time, claimant was complaining of a dull, aching low back pain as well as pain when he changed positions from lying to sitting or from sitting to standing.

Dr. MacMillan found that claimant had normal posture and a well healed low back wound. He sent claimant to physical therapy, but his attendance was inconsistent. Dr. MacMillan last saw claimant on January 31, 1997. At that time, claimant reported that he had been doing some odd jobs and had significant improvement in his low back pain. In reviewing x-rays, Dr. MacMillan said there appeared to be some evidence that there was a developing fusion mass in the disc. Claimant's range of motion had improved considerably. He had normal flexion and minimal limitation of low back extension, normal bilateral bending and sensation, with the exception of numbness in his right toes, and a normal gait. Dr. MacMillan found claimant to be at maximum medical improvement. He testified that he used the 3rd edition of the *AMA Guides* and opined that claimant had an 11 percent whole body impairment as a result of his injury.

Dr. Edward Prostic, a board certified orthopedic surgeon, examined claimant on August 11, 1997, at the request of claimant's attorney. Claimant complained of persistent pain in his left low back. Claimant reported only partial relief from his surgery. Dr. Prostic testified that he was doubtful that a fusion occurred with claimant. Dr. Prostic argued that if there was not a solid fusion, with time claimant could expect breakage of the hardware or loosening of the hardware. Dr. Prostic recommended that claimant be followed by an orthopedic specialist until such time as he is determined to have a solid fusion. He stated that alternative treatment would be to explore the arthrodesis and augment if necessary or to follow the patient for loosening or breakage of his hardware and give additional treatment should either occur. At that time, Dr. Prostic gave claimant a 25 percent permanent partial disability to the body as a whole.

Dr. Prostic's deposition was taken a second time on January 20, 2006. Before that deposition, he reviewed some subsequent medical records of claimant and testified that the review of those medical records did not change the opinions given in his previous deposition. In fact, he felt the subsequent medical records supported his original report. Dr. Prostic used the diagnosis related estimate (DRE) model in the 4th edition of the *AMA Guides* and opined that claimant had a 25 percent permanent partial impairment of the body as a whole. A third deposition of Dr. Prostic was taken on April 7, 2006, in order to correct his rating. In this deposition, Dr. Prostic testified that using the *AMA Guides*, 3rd Edition Revised, he would still rate claimant as having a 25 percent permanent partial disability to the body as a whole.

Dr. Prostic admitted he did not use the range of motion model when he first gave his opinion on impairment. There was no DRE model in the *AMA Guides*, 3rd Edition Revised, so he was required to use range of motion. Dr. Prostic testified that he had done range of motion studies when he examined claimant in 1997. However, he admitted that he did not measure range of motion with an inclinometer.

Sometime after Dr. Prostic's examination of claimant in August 1997, claimant and his wife divorced, and he moved to Louisiana. Claimant died in March 2000 of causes not related to his work-related injury. At no time did claimant give any testimony in this claim. There is evidence in the record that he continued to be treated by various doctors after being seen by Dr. Prostic.

Respondent contends that the ALJ erred in allowing this workers compensation claim to proceed in claimant's name after claimant's death and not ordering that the real party in interest be substituted. Respondent further argues that the ALJ erred in ordering that the award be paid to claimant's estate when no such entity exists. Conversely, claimant's counsel argues that a substitution of parties is not necessary and that respondent is protected because it need not pay the ordered benefits until after an estate is opened.

K.S.A. 44-510e(b) provides:

If an employee has received an injury for which compensation is being paid, and the employee's death is caused by other and independent causes, any payment of compensation already due the employee at the time of death and then unpaid shall be paid to the employee's dependents directly or to the employee's legal representatives if the employee left no dependent, but the liability of the employer for the payments of compensation not yet due at the time of the death of such employee shall cease and be abrogated by the employee's death.

The unpaid compensation due at the time of claimant's death is to be paid to claimant's dependents, if any, and if none then to claimant's legal representative. Although there are statements of counsel that claimant left no dependents, that fact has not been established. Furthermore, there is no legal representative of claimant in this case. Counsel's contract of employment with claimant and his appearance as attorney for claimant does not continue on and constitute an attorney/client relationship with claimant's estate. Mr. Shetlar's appearance does not satisfy the requirement for a legal representative. Opening an estate would allow for the appointment of a legal representative and provide a mechanism for determining claimant's heirs at law. This procedure would also assist with ascertaining whether claimant was survived by dependents. As the real party in interest was not substituted for the deceased claimant, the ALJ was without jurisdiction to enter an award. Accordingly, the ALJ's award is reversed and remanded to allow for a substitution of parties.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated June 5, 2006, is reversed and remanded to the ALJ for further proceedings and orders consistent herewith.

IT IS SO ORDERED.

Dated this _____ day of October, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant
Matthew J. Hempy, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge